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Supreme Court, U.S.
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In The

Supreme Court of the United States

ANIMAL PROTECTION AND RESCUE LEAGUE, *et al.*,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GERALD B. SINGLETON
Counsel of Record
LAW OFFICES OF
GERALD B. SINGLETON
1950 5th Ave. #200
San Diego, CA 92101
(619) 239-2196

BRYAN W. PEASE
LAW OFFICES OF
BRYAN W. PEASE
302 Washington St. #404
San Diego, CA 92103
(619) 723-0369
(Application pending)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

This petition presents only one question: Is express federal preemption of enforcement of a state court ruling a substantial enough question of federal law to invoke federal court jurisdiction under 28 USCS § 1331 to hear a state law claim for a writ of mandate seeking to require a municipality to enforce a local ordinance, where the only unresolved issue is whether federal law prevents the state court from blocking implementation of the local ordinance?

PARTIES

The petitioners in this case are the Animal Protection and Rescue League and Dorota Valli. The respondents are the City of San Diego Department of Parks and Recreation, Mayor Jerry Sanders, and the State of California.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners confirm that none of the petitioners have parent companies nor do any publicly held companies own ten percent or more of their stock.

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PETITION FOR WRIT OF CERTIORARI

The Animal Protection and Rescue League, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at 2008 U.S. App. LEXIS 13127 (9th Cir. 2008) and reprinted in the Appendix ("App.") at App. 1. The opinion of the district court is reported at 2008 U.S. Dist. LEXIS 8030 (S.D. Cal. 2008) and reprinted in the Appendix at App. 3.

JURISDICTION

The Court of Appeals entered its judgment on June 17, 2008 and denied rehearing on July 28, 2008. The jurisdiction of this Court is invoked under 28 USCS § 1254(1).

STATUTES INVOLVED

Petitioners seek to require the City of San Diego to enforce a municipal ordinance under Cal. Code Civ. Proc. § 1085(a), which provides:

> A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

Enforcement of the municipal ordinance is currently being blocked by a state court ruling in a case petitioners were not a party to. Petitioners contend that the federal Marine Mammal Protection Act ("MMPA") expressly preempts enforcement of the state court ruling and thus allows the municipal ordinance to be enforced to place the rope in order to protect pregnant and nursing harbor seals, a position amicus U.S. Government agreed with. (App. 19-21). *See* 16 USCS § 1379(a), which provides:

> State enforcement of State laws or regulations prohibited without transfer to State of management authority by Secretary. No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1).

Under 16 USCS § 1362(13), "The term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." Under § 1362(13)(A), "The term 'harassment' means any act of pursuit, torment, or annoyance which – (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering."

The limits of 28 USCS § 1331 are at issue, which provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The Ninth Circuit dismissed for lack of federal jurisdiction due to the MMPA not containing a private enforcement mechanism other than to challenge the granting or denial of a permit. (App. 2). However, petitioners contend the case presents a substantial question of federal law sufficient to invoke federal jurisdiction.

STATEMENT OF THE CASE

In early 2008, a state court ruled that the City of San Diego suddenly could not continue to erect a seasonal rope barrier at a beach to protect pregnant and nursing harbor seals due to a 1931 state law

requiring this particular beach to be used as a "bathing pool." (App. 6-7). Plaintiffs/Appellants in the present case filed suit in federal district court and argued that 16 USCS § 1379(a) preempts enforcement of the state law being used to block placement of the rope. The district court dismissed on *Younger*[1] abstention grounds, despite the fact that Plaintiffs were not parties to the previous state court litigation. (App. 9-10). *Younger* is a discretionary doctrine that avoids undue interference with ongoing state court proceedings and can only apply to non-parties to the state court litigation in very limited circumstances, and its application was clearly inapplicable to the present case. *See Green v. City of Tucson*, 255 F.3d 1086, 1099-1102 (9th Cir. 2001).

Plaintiffs appealed and filed an emergency motion with the Ninth Circuit to maintain the status quo and allow the rope to continue to be used while the case was pending. The Ninth Circuit granted the motion and *sua sponte* expedited the appeal. (App. 14-15). The Ninth Circuit also requested briefing from the U.S. Government on the issues of federal preemption and abstention raised by the case. (App. 15). The U.S. Government filed an *amicus* brief agreeing that the district court erred in dismissing on *Younger* abstention grounds, and further erred in ruling that the MMPA did not preempt a state court ruling disallowing the rope, but that the dismissal should nonetheless be affirmed because the MMPA does not

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[1] *Younger v. Harris*, 401 U.S. 37 (1971).

contain a private cause of action for citizens to enforce its provisions. (App. 19-21).

The U.S. Government cited *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) (hereinafter "FTB"), and *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164 (1997) in support of its position that lack of a federal cause of action precludes federal jurisdiction. (App. 19). However, both of these cases note that federal courts have jurisdiction to hear claims arising from state law when they require resolution of a substantial question of federal law. *See Franchise Tax Bd.*, 463 U.S. 1, 13; *City of Chicago, supra*, 522 U.S. 156, 164. Nonetheless, the Ninth Circuit dismissed on the sole ground that the MMPA does not confer a private right of action. (App. 2). In its unpublished decision, the panel did not address the issue of state law claims raising a substantial question of federal law, apparently believing that it was unable to do so when the federal law lacked a private cause of action. The panel then denied a petition for rehearing, and no other judge requested a vote for rehearing *en banc*. (App. 17).

WHY REVIEW SHOULD BE GRANTED

According to recent unanimous Supreme Court precedent, the fact that the federal law at issue does not contain a private cause of action does *not* automatically deprive the federal courts of jurisdiction to hear state law claims that require interpretation of

the federal law. In *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318 (2005), a unanimous Court ruled that a private cause of action is not always required for there to be a substantial question of federal law to confer federal subject matter jurisdiction. *Id.* at 318. *Grable* resolved a split in authority in the circuit courts over this issue that had resulted from the Court's previous divided ruling in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). *Grable*, 545 U.S. 308, 312 fn.2. In *Merrell Dow*, a deeply divided Court had ruled 5-4 that a tort case against a drug company could not be removed to federal court merely because the complaint alleged noncompliance with the federal Food, Drug and Cosmetics Act (FDCA), which the parties stipulated did not contain a private right of action.

In *Grable*, the Court distinguished *Merrell Dow* and unanimously reaffirmed the "commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable* at 312. The test articulated in *Grable* was whether "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314.

FTB, supra, 463 U.S. 1, 21, held that declaratory relief is not available in federal court to declare the

validity of a state law in the face of potentially conflicting federal law, because this would be an attempt to circumvent the normal rule by a party who would normally be a defendant, but "goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Id.* at 16, fn.14, citing *Public Service Com. v. Wycoff Co.*, 344 U.S. 237, 248 (1952). That is not the case here, where Plaintiffs seek to require the City to enforce its own ordinance, and in order to do so, a federal court must declare the *invalidity* of particular enforcement of a state law due to federal preemption. Federal preemption is not an anticipated *defense* in the case at bar, but is rather the basis for the relief requested by Plaintiffs.

The relief requested by Plaintiffs does not contradict the doctrine of *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), which held that the federal declaratory judgment procedure cannot create federal jurisdiction where it is otherwise lacking, and which the Court in *FTB* held applies with equal force to state declaratory judgment procedures. *FTB,* 463 U.S. 1, 16. In that particular case, the State of California was seeking to have the validity of its own law declared in federal court and raised federal preemption issues. In the case at bar, if the State of California had gone to federal court to preemptively declare the validity of the state court's interpretation of its 1931 law that is preventing enforcement of the City's seasonal rope ordinance, it would have run afoul of the *Skelly Oil* doctrine and the well-pleaded complaint rule, because it would be anticipating and

attempting to preemptively rebut a defense to an injunction action based on federal law.

On the other hand, if the City had gone to federal court to seek a declaration of the invalidity of the state law preventing enforcement of its local ordinance, federal jurisdiction would exist because "a person subject to a scheme of federal regulation may sue in federal court to enjoin application to him of conflicting state regulations." *Id.* at 20. While Plaintiffs in the present action are not themselves subject to the state law, they are seeking to compel the City to take action that would violate a state court order if not for federal preemption, thus raising a substantial question of federal law on which Plaintiffs' right to relief depends, and which is not a an attempt to prevent a *defense* based on federal law.

Cal. Code Civ. Proc. § 1085(a) provides a state law cause of action for mandamus to compel the City to enforce its own ordinance, and this claim can be brought in federal court by virtue of Plaintiffs' right to relief – and not an anticipated defense – raising a substantial question of federal law. In the case at bar, the *only* disputed issue is whether and to what extent the federal MMPA preempts enforcement of a 1931 state law interpreted by a state court to prevent implementation of a local ordinance Plaintiffs seek to have enforced.

CONCLUSION

In dismissing Plaintiffs' case, the Ninth Circuit erroneously assumed that lack of a private cause of action in the federal law sought to be enforced automatically deprives the federal courts of subject matter jurisdiction to hear state law claims raising substantial questions regarding that federal law. As Justice Thomas pointed out in his concurring opinion in *Grable*, 545 U.S. 308, 321, the jurisdictional rules in this type of case are complicated, and it would be less complicated to automatically disallow federal jurisdiction when the federal statute sought to be interpreted lacks a private right of action. However, the unanimous decision of the Court in *Grable* was to not require the substantial question of federal law inquiry to turn on whether or not there is a private right of action in the statute.

In the present case, the U.S. Government agrees that federal preemption exists, as did a panel of the Ninth Circuit which granted an emergency motion allowing the rope barrier Plaintiffs seek to implement. Clearly there is a substantial question of federal law here. Plaintiffs therefore respectfully request a writ of certiorari on the question of how substantial the federal question must be to invoke jurisdiction under 28 USCS § 1331.

Respectfully submitted,

GERALD B. SINGLETON
1950 5th Ave. #200
San Diego, CA 92101
(619) 239-2196

BRYAN W. PEASE
302 Washington St. #404
San Diego, CA 92103
(619) 723-0369
(Application pending)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANIMAL PROTECTION AND RESCUE LEAGUE, a non profit corporation; DOROTA VALLI, an individual, Plaintiffs-Appellants, VALERIE O'SULLIVAN, Intervenor-Intervenor, v. STATE OF CALIFORNIA; THE CITY OF SAN DIEGO DEPARTMENT OF PARKS AND RECREATION; JERRY SANDERS, Mayor; DOES, 1 to 100, Defendants-Appellees.	No. 08-55319 D.C. No. CV 07-2320-JM-AJB MEMORANDUM* (Filed Jun. 17, 2008)

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted June 4, 2008
Pasadena, California

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: KOZINSKI, Chief Judge, ALDISERT,** and D.W. NELSON, Circuit Judges.

Appellants challenge the application of a state law that was interpreted by a state court to require the dispersal of a colony of harbor seals. Appellants contend that the state law conflicts with the local government's obligations under the federal Marine Mammal Protection Act ("MMPA"). The district court dismissed the suit pursuant to the *Younger* abstention doctrine. *See Younger v. Harris,* 401 U.S. 37 (1971).

We lack federal question jurisdiction over this matter. *See* 28 U.S.C. § 1331. Appellants are not challenging the grant or denial of a permit application under the MMPA. *See* 16 U.S.C. § 1374(d)(6). This court does not otherwise have jurisdiction to consider appellants' suit seeking to enforce the terms of the MMPA. *See Didrickson v. U.S. Dep't of Interior,* 982 F.2d 1332, 1338 (9th Cir. 1992) ("[T]he MMPA does not provide for citizens to sue to enforce the statute").

DISMISSED.

** The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANIMAL PROTECTION AND RESCUE LEAGUE; DOROTA VALLI, Plaintiffs, vs. STATE OF CALIFORNIA; CITY OF SAN DIEGO DEPARTMENT OF PARKS AND RECREATION; MAYOR JERRY SANDERS, Defendants.	CASE NO. 07cv2320 JM(AJB) ORDER GRANTING AMICUS STATUS; ABSTAINING FROM EXERCISING SUBJECT MATTER JURISDICTION OVER ACTION (Filed Feb. 27, 2008)

In its February 4, 2008 Order Denying Motion for Temporary Restraining Order ("TRO Order"), the court requested further briefing on whether abstention doctrines would apply under the present circumstances to deprive the court of subject matter jurisdiction to entertain this action. Also pending before the court are Prospective Intervenor O'Sullivan's motion to intervene or, alternatively, to be permitted to file an *amicus* brief and Plaintiffs' motion for preliminary injunction. For the reasons set forth below, the court grants Prospective Intervenor O'Sullivan (hereinafter "Amicus") leave to file amicus briefs in this case, and abstains from exercising subject matter jurisdiction over the present action.

The Clerk of Court is instructed to close the file and deny all pending motions as moot.

BACKGROUND

Plaintiffs Animal Protection and Rescue League ("APRL") and Dorota Valli commenced this action seeking, among other things, to compel defendant City of San Diego ("City") to place a seasonal rope barrier at the La Jolla Children's Pool Beach ("CPB") to limit human interaction with harbor seals during pupping season.

In 1930 Ellen Scripps requested and received approval for the construction of a 300-foot concrete breakwater in the Pacific Ocean adjacent to La Jolla to create a bathing pool.[1] The State of California granted lands, including the lands encompassing CPB to the City in trust. One condition of the trust provided that City was to devote the land "exclusively to public park, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes. . . . " By 1997, CPB was no longer usable as a bathing beach

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[1] The background section is primarily based upon the factual background set forth by the California Superior Court and Court of Appeal. *O'Sullivan v. City of San Diego,* No. GIC 826918 (S.D. Cal. Sup. August 26, 2005); *O'Sullivan v. City of San Diego,* No. D047382 (Cal.App. September 7, 2007).

because of contamination caused by the presence of harbor seals and sea lions.

On March 12, 2004, Amicus, Valerie O'Sullivan, commenced an action in San Diego alleging City violated the 1931 statutorily-created public trust for the area known as CPB (the "1931 Tidelands Grant"). *O'Sullivan v. City of San Diego,* No. GIC 826918, (S.D. Sup.Ct. 2004) (Amicus Exh. 1). Among other things, Superior Court Judge William Pate concluded: (1) since 1997, the beach and water inside the breakwater are polluted and pose a health risk to humans because of high concentrations of seal feces; (2) in its present state, CPB is not suitable for the uses enumerated in the 1931 Tidelands Grant; (3) placement of a rope barrier at CPB further restricted public access to CPB and contributed to the increase in pollution; (4) the Marine Mammal Protection Act ("MMPA") § 109(h) permits the removal of the seal population from CPB; and (5) James Lecky, West Coast Administrator from the National Marine Fishery Services ("NMFS") advised the City that § 109(h) of MMPA permitted the City to address the health and safety issues presented at CPB and that the harbor seals are not a threatened nor endangered species. In light of the legal and factual findings of the Superior Court, the City was "ordered to employ all reasonable means to restore the Pool to its 1941 condition by removing the sand build-up and further to reduce the level of water contamination in the Pool to levels certified by the County of San Diego as being safe for humans." The order, entered on August 26,

2005, required the City to comply with the court's order within six months and to comply with all applicable state and federal laws. The City has yet to comply with the court's order.

The City appealed the order and judgment of the Superior Court. The Court of Appeal affirmed the judgment of the Superior Court. The appellate court discussed the applicability of § 109(h) of MMPA to the CPB, noting that the exception applied under the circumstances:

> Because feces from the substantial number of seals at the Children's Pool result in high levels of water pollution, it can reasonably be concluded there is damage to public property and danger to the health and safety of persons at the children's Pool within the meaning of those exceptions. Considering those circumstances, the trial court could reasonably conclude those exceptions to the MMPA applied and did not preclude its Injunction against City requiring City to, in effect, remediate those problems by restoring the Children s Pool to its 1941 condition.

(Amicus Exh. 2, pp. 45-46).

After the California Supreme Court denied review, City filed a "Motion to Clarify the Court's Injunction" which requested the court to reconsider the "rope issue" and permit the City to place a seasonal rope barrier during pupping season on the shore of CPB. (Amicus Exh. 4; February 21, 2008 TR23:11-24:13). Superior Court Judge Yuri Hofmann

declined to reconsider the placement of a seasonal rope barrier stating:

> Specifically, the 'rope issue' was discussed both this Court's and the Court of Appeal's final rulings in favor of Plaintiff and against the City. Ultimately, both Courts found that the placement of a 'rope barrier cutting off public access to the Pool' . . . resulted in the City's breach of its obligations as trustee under the subject Trust.

Id. Further, Judge Hofmann noted that "the relevant issue has been considered and decided, and the Court's directives to the City are clear and unambiguous." Id.

On December 11, 2007 Plaintiffs commenced the present action seeking injunctive relief to compel Defendants (1) to obtain a MMPA permit prior to "attempting to scare the seals away," (Comp. ¶26); and (2) to place a rope barrier at CPB during pupping season. On February 4, 2008 the court issued its order denying Plaintiffs' request for a TRO and requested further briefing from the parties on whether the court should abstain from exercising subject matter jurisdiction over this action. Plaintiffs are opposed to abstention and Defendants City and Mayor Jerry Sanders and Amicus O'Sullivan advocate for abstention. Plaintiffs also move for the issuance of a preliminary injunction to compel Defendants to install a rope barrier at CPB during seal pupping season, and Amicus O'Sullivan moves to intervene or,

alternatively, for leave to file amicus briefs in this action.[2] All motions are opposed.

DISCUSSION

Abstention

"[T]he policy objective behind *Younger* abstention is to avoid unnecessary conflict between state and federal governments." *United States v. Morros,* 268 F.3d 695, 707 (9th Cir. 2001). *Younger* abstention is a doctrine of equitable restraint, not a jurisdictional limitation. *See Ohio Civil Rights Comm'n v. Dayton Christian schools, Inc.,* 477 U.S. 619, 626 (1986). Based on principles of comity and federalism, *Younger* "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 431 (1982). "[U]nder *Younger* a federal court should abstain if '(1) there are ongoing state judicial proceedings, (2) the proceedings implicate important state interests, and (3) there is an

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[2] The court grants Amicus O'Sullivan's motion for leave to file amicus briefs in the present action. Although the court is unaware of any controlling authority for the proposition that granting the motion to intervene would compromise the court's ruling on abstention, the more prudent action would be to grant O'Sullivan amicus status. With respect to the motion to intervene, the court notes that Amicus O'Sullivan's need to intervene is substantially diminished in light of City's position to abide by the state court judgment and to seek all necessary approvals prior to remediating CPB.

adequate opportunity in the state proceeding to raise federal questions.'" *Woodfeathers, Inc. v. Washington County, Or.,* 180 F.3d 1017, 1020 (9th Cir. 1999) (quoting *Gartrell Constr., Inc. v. Aubry,* 940 F2d 437, 441 (9th Cir. 1991). Federal courts should abstain if the court's action would enjoin, or have the practical effect of enjoining, on-going state court proceedings. *Amerisourcebergen Corp. v. Roden,* 495 F.3d 1143, 1150 (9th Cir. 2007) (goal of *Younger* is to "avoid interference with uniquely state interests").

Here, the court concludes that the prerequisites for abstention are solidly established. First, significant state court proceedings have occurred in the Superior Court as well as at the Court of Appeal. The Superior Court's determinations, findings, and legal conclusions have been affirmed by the California Court of Appeal. Moreover, the state court action is still ongoing in the sense that the Superior Court retained jurisdiction to oversee compliance with its judgment.[3] Second, the underlying proceedings implicate important state interests associated with the 1931 Tidelands Grant. The City has a unique interest in its citizens being able to enjoy its parks and beaches without being subjected to health and safety issues created by the seal population at CPB. Further, the City is the trustee over state lands granted to the City in trust for the benefit of state residents

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[3] City represents that it is in the process of obtaining all necessary permits to comply with Judge Pate's order.

and has a unique interest in enforcing state court judgments. Finally, state court proceedings are presumed adequate to raise the federal claim "in the absence of unambiguous authority to the contrary." *Pennzoil v. Texaco, Inc,* 481 U.S. 1, 15 (1987). Here, the parties to the state court action did, in fact, raise federal law issues relevant to the MMPA. Judge Pate, as well as the Court of Appeal, directly addressed whether the MMPA permitted the removal of the seal population from CPB. The issue of the rope barrier at CPB has also been addressed in state court.[4]

In sum, the court declines to exercise subject matter jurisdiction in this case and dismisses the action.

The Motion for Preliminary Injunction

In light of this court's determination that abstention is appropriate under the circumstances, Plaintiffs' motion for a preliminary injunction is moot. Notwithstanding, even if the court were to reach the merits of this motion, Plaintiffs would not prevail.[5]

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[4] Although not addressed by the parties, the court notes that *Younger* abstention is appropriate even though Plaintiffs herein were not parties to the state court actions. Plaintiffs were fully aware of the state court proceedings (and filed amicus briefs in the state court proceedings) and had an adequate opportunity to intervene in those proceedings. *See Delta Dental Plan of Calif. v. Mendoza,* 139 F.3d 1289, 1298 (9th Cir. 1998).

[5] Preliminary injunctive relief is available if the party meets one of two tests: (1) a combination of probable success on

(Continued on following page)

To prevail on the merits, Plaintiffs necessarily contend that MMPA preempts the 1931 Tidelands Grant.[6] Plaintiffs argue that the MMPA expressly preempts state law because § 1379(a) provides:

> No state may enforce, or attempt to enforce, any State law or regulation relating, to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as 'management authority') to the State under subsection (b)(1).

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the merits and the possibility of irreparable harm, or (2) the party raises serious questions and the balance of hardship tips in its favor. *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.* Under both formulations, however, the party must demonstrate a "fair chance of success on the merits" and a "significant threat of irreparable injury." *Id.* The court also considers the relative balance of harm to the parties and the public interest at stake. *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1388 (9th Cir. 1988).

[6] While Plaintiffs assert federal question jurisdiction based, in part, upon the MMPA, the court questions the viability of such claim as there is no private right of action under the MMPA. *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992). Any remedy, if one exists at all, appears to arise under the Administrative Procedure Act, 5 U.S.C. § 704, and not the MMPA.

13 U.S.C. § 1379(a). Looking only to this provision, Plaintiffs conclude that all state laws regulating the taking of any species, including the Tidelands Grant, is expressly preempted.

As noted in the TRO, this "facile argument is not persuasive," (TRO Order at p.6:15-16), as it ignores the plain language of § 109(h) of MMPA, codified at 13 U.S.C. § 1379(h), which specifically permits state and local government agencies to use non-lethal force to remove marine mammals that pose a health and safety threat. Thus, as represented by James Lecky, West coast administrator from NMFS, § 1379(h) permits the City to address the health and safety issues presented at CPB by using non-lethal means to remove the harbor seals. Moreover, the legislative history reveals that state and local governments play an important role in the removal of non-threatened or endangered species that present a health and safety risk to humans:

> Section, 109(h) essentially restates existing law, except that, as rewritten, subsection (h) clarifies that federal, as well as state or local employees may take marine mammals in the course of their official duties and clarifies that the non-lethal removal of nuisance animals may also be carried out by federal, state or local government employees.

(Valli Decl., filed in support of preliminary injunction, Exh. B, excerpts of 1981 amendments to the MMPA). Seen in this light, Plaintiffs cannot prevail on their express preemption argument. Absent a minimal

showing of the likelihood of success on the merits, Plaintiffs are not entitled to preliminary injunctive relief.

In sum, the court abstains from exercising subject matter jurisdiction over the action. The Clerk of Court is instructed to dismiss the action and deny all pending motions as moot.

IT IS SO ORDERED.

DATED: February 27, 2008

/s/ Jeffrey T. Miller
Hon. Jeffrey T. Miller
United States District Judge

cc: All parties

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL PROTECTION AND RESCUE LEAGUE and DOROTA VALLI, Plaintiffs-Appellants, v. THE STATE OF CALIFORNIA, THE CITY OF SAN DIEGO DEPARTMENT OF PARKS AND RECREATION, et al. Defendants-Appellees	No. 08-55319 D.C. No. 07-CV-2320-JM Southern District of California, San Diego ORDER (Filed Mar. 10, 2008)

Before: T.G. NELSON, TASHIMA and BYBEE, Circuit Judges.

We have reviewed appellants' emergency motion and motion to consider new evidence, the response filed by the City of San Diego, appellants' reply and the record in this matter. Appellants' motion to consider new evidence is granted. Appellants' emergency motion for injunctive relief pending disposition of this appeal is granted. Application of state law or any state court order to prevent placement of a guideline rope on the La Jolla Children's Pool Beach is stayed pending further order of the court. A guideline rope may be placed on the beach to protect seals and their pups until May 30, 2008.

The court *sua sponte* extends the time for the Attorney General of the United States to respond to the court's March 6, 2008 order. The Attorney General of the United States is invited to file a letter brief in this appeal, no later than Monday, March 24, 2008, expressing the views of the United States on the issues of abstention and federal preemption raised by this appeal.

The court *sua sponte* expedites this appeal. The opening brief is due April 7, 2008; the answering brief is due April 28, 2008; and the optional reply brief is due May 5, 2008.

The provisions of Ninth Circuit Rule 31-2.2(a) shall not apply to this appeal. Written motions for further extensions of time to file the briefs will not be granted absent demonstration of extraordinary and compelling circumstances. *See* 9th Cir. R. 31-2.2(a). Each brief shall be received in the office of opposing counsel at the time the brief is due in this court. The parties are reminded that Ninth Circuit Rule 31-2.1(a) applies.

The Clerk shall calendar this case during the month of June 2008, in Pasadena, California.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL PROTECTION AND RESCUE LEAGUE, a non profit corporation; DOROTA VALLI, an individual, Plaintiffs-Appellants, VALERIE O'SULLIVAN, Intervenor-Intervenor, v. STATE OF CALIFORNIA; THE CITY OF SAN DIEGO DEPARTMENT OF PARKS AND RECREATION; JERRY SANDERS, Mayor; DOES, 1 to 100, Defendants-Appellees.	No. 08-55319 D.C. No. 07-CV-2320-JM-AJB Southern District of California, San Diego ORDER (Filed Jul. 28, 2008)

*Before: KOZINSKI, Chief Judge, ALDISERT and D.W. NELSON, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Chief Judge Kozinski voted to deny the petition for

* The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

rehearing en banc and Judges Aldisert and D. W. Nelson so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are denied.

App. 18

No. 08-55319

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL PROTECTION AND RESCUE LEAGUE & DOROTA VALLI,

Plaintiffs-Appellants,

v.

THE STATE OF CALIFORNIA, et al.,

Defendants-Appellees

On Appeal from an Order of the United States District Court for the Southern District of California

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

RONALD J. TENPAS
Assistant Attorney General

ANDREW MERGEN
PETER J. MCVEIGH
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 4390, Ben Franklin Station
Washington, D.C. 20044-4390
(202) 514-4642

* * *

ARGUMENT

I. APRL lacks a cause of action that confers federal question jurisdiction.

APRL's opening brief asserts that the district court had federal-question jurisdiction under 28 U.S.C. § 1331. APRL Br. at 1. Under the well-pleaded complaint rule, APRL must thus assert either a cause of action created by federal law or a state-law cause of action for which an essential element of the right to relief is based on federal law. *See City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163-64 (1997); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-11 (1983). As discussed in detail below, APRL has failed to satisfy the requirements of this rule, because it lacks a cause of action to sue non-federal entities for failing to comply with the MMPA.

* * *

B. The guideline rope

The harassment of seals by the general public, of course, constitutes an unauthorized taking. *See* 16 U.S.C. § 1362(13). And NOAA has advised the City to install a guideline rope during the pupping season to minimize these takings. In light of these circumstances, to the extent the state law prohibits the City from adopting this measure, it relates to the taking of seals.

Moreover, the conclusion that the MMPA preempts this aspect of the state law is consistent with the statute's underlying objectives. After all, the

unauthorized taking of marine mammals is something the MMPA is intended to prevent. *See* H.R. Rep. No. 92-707 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 4144. And while installing a guideline rope during the seal pupping season is consistent with this objective, prohibiting a local government from taking such a measure on its own property is not; indeed, such an interpretation of the state law frustrates the MMPA's prohibition on the unauthorized taking of marine mammals, as well as NOAA's efforts to enforce the statute.

Furthermore, section 109(h) is inapposite to the installation of a guideline rope. The state law's prohibition against installation of a guideline rope does not itself require or result in the taking of a marine mammal by government officials, and the purpose of this prohibition is not to protect marine mammals, to protect the public health or welfare, or to remove nuisance animals. The MMPA thus expressly preempts the state law to the extent it prohibits the City from installing a guideline rope during the pupping season.[12]

* * *

[12] We note that section 109(a) preempts "enforcement" of offending aspects of the state law, *see* 16 U.S.C. § 1379(a), but does not, of course, provide a basis for striking down the entire state law.

CONCLUSION

In sum, the district court's order should be affirmed, as APRL lacks a cause of action that confers federal question jurisdiction. *Younger* abstention, contrary to the district court's finding, has no application to this case. And although this Court should not reach the issue of preemption, to the extent the state law requires the removal of the guideline rope, the MMPA preempts its enforcement.

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General

/s/ Peter McVeigh
ANDREW C. MERGEN
PETER J. MCVEIGH
Attorneys
Environment &
Natural Resources Div.
Department of Justice
PO Box 4390,
Ben Franklin Station
Washington, D.C. 20044-4390
(202) 514-4642
Fax (202) 514-4231

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